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No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Detainee Treatment Act of 2005 divests this Court of jurisdiction over this case.

2. Whether federal courts should abstain from interfering with ongoing military commission proceedings.

3. Whether the President has constitutional or statutory authority to establish military commissions.

4. Whether the Geneva Convention Relative to the Treatment of Prisoners of War creates judicially enforceable rights.

5. Whether the President permissibly determined that the Geneva Convention does not cover, or afford prisoner-of-war status to, al Qaeda combatants.

6. Whether the federal regulations governing military commissions must conform to provisions in the Uniform Code of Military Justice that apply by their terms only to courts-martial.

TABLE OF CONTENTS

Page

Jurisdiction 1
Statement 1
Summary of argument 7
Argument:
I. This pre-trial challenge to petitioner's military commission is jurisdictionally foreclosed and fatally premature 12
II. The President has ample authority to convene military commissions to try and punish al Qaeda combatants such as petitioner 15
A. Congress has authorized the use of military commissions in the armed conflict with al Qaeda 15
B. The Constitution authorizes the President to establish military commissions to try al Qaeda combatants 20
C. Al Qaeda's wholesale disregard for the law of war does not exempt it from punishment for violations of the law of war 23
D. Petitioner's case-specific and treaty-based objections to his military commission lack merit 26
1. Military commissions may be and long have been convened outside the zone of combat .. 27
2. The offense of conspiracy may be and long has been tried before a military commission 27
3. As a non-citizen enemy combatant, petitioner may be tried before a military commission 28
4. Petitioner's treaty-based objections lack merit 30

Table of Contents—Continued: Page

a. The Geneva Convention does not give rise to judicially enforceable rights 30
b. Petitioner has no valid claim under the Convention in any event 37
E. Petitioner does not enjoy the protections of our Constitution 43
III. Petitioner's procedural objections to his military commission are unfounded 43
A. The procedures established for petitioner's military commission do not contravene the UCMJ 43
B. Article 3 of the Geneva Convention does not apply to petitioner's military commission 48
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 38
Bowrin v. *INS*, 194 F.3d 483 (4th Cir. 1999) 36
Charlton v. *Kelly*, 229 U.S. 447 (1913) 30
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 38
Colepaugh v. *Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957) 27
Cook County v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) 28
Doe v. *Braden*, 57 U.S. (16 How.) 635 (1853) 38

Cases—Continued: Page

Foster v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) 30

Hain v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003) 37

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 7, 8, 16, 18, 20, 29, 42

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 20

Head Money Cases, 112 U.S. 580 (1884) 30

Hirota v. *MacArthur*, 338 U.S. 197 (1949) 13, 16, 21

Jimenez v. *Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963) 36

Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 9, 11, 21, 24, 31, 32, 34

Kadic v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) 49

Lewis v. *Casey*, 518 U.S. 343 (1996) 13

Lorillard v. *Pons*, 434 U.S. 575 (1978) 18

Ludecke v. *Watkins*, 335 U.S. 160 (1948) 24

Madsen v. *Kinsella*, 343 U.S. 341 (1952) 11, 17, 45

McElroy v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) 14

Milligan, Ex parte, 71 U.S. (4 Wall.) 2 (1866) 28

Mistretta v. *United States*, 488 U.S. 361 (1989) 23

Monahan v. *Dorchester Counseling Ctr., Inc.*, 961 F.2d 987 (1st Cir. 1992) 35

Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 36

Ogbudimkpa v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003) 37

Cases—Continued: Page

Poindexter v. *Nash*, 333 F.3d 372 (2d Cir. 2003), cert. denied, 540 U.S. 1210 (2004) 37
Quirin, Ex parte, 317 U.S. 1 (1942) ..... *passim*
Rasul v. *Bush*, 542 U.S. 466 (2004) 32
Reid v. *Covert*, 354 U.S. 1 (1957) 14
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 7, 12, 13, 14
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 36
Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176 (1982) 34
The Paquete Habana, 175 U.S. 677 (1900) 49
The Prize Cases, 67 U.S. (2 Black) 635 (1862) . 18, 19, 24, 25
The Three Friends, 166 U.S. 1 (1897) 24
United States v. *Anderson*, 38 C.M.R. 386 (C.M.A. 1968) 19
United States v. *Averette*, 41 C.M.R. 363 (C.M.A. 1970) 19
United States v. *Bancroft*, 11 C.M.R. 3 (C.M.A. 1953) 19
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 22, 38
United States v. *De La Pava*, 268 F.3d 157 (2d Cir. 2001) 31
United States v. *Emuegbunam*, 268 F.3d 377 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002) 31
United States v. *Jimenez-Nava*, 243 F.3d 192 (5th Cir.), cert. denied, 533 U.S. 962 (2001) 31

Cases—Continued: Page

United States v. *Li*, 206 F.3d 56 (1st Cir.), cert. denied, 531 U.S. 956 (2000) 31
United States v. *Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) 41
United States v. *Stuart*, 489 U.S. 353 (1989) 34
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 14
United States ex rel. Perez v. *Warden*, 286 F.3d 1059 (8th Cir.), cert. denied, 537 U.S. 869 (2002) 37
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 14
Vallandigham, Ex parte, 68 U.S. (1 Wall.) 243 (1863) 22
Wang v. *Ashcroft*, 320 F.3d 130 (2d Cir. 2003) 37
Wesson v. *United States Penitentiary Beaumont*, 305 F.3d 343 (5th Cir. 2002), cert. denied, 537 U.S. 1241 (2003) 37
Whitney v. *Robertson*, 124 U.S. 190 (1888) 30
Wildenhus's Case, 120 U.S. 1 (1887) 36
Yamashita, In re, 327 U.S. 1 (1946) 11, 13, 16, 21
Yang v. *California Dep't of Soc. Servs.*, 183 F.3d 953 (9th Cir. 1999) 35

Constitution, treaties, statutes, regulations and rules: Page

U.S. Const.:
Art. II 16
§ 2 21
Charter of the International Military Tribunal, Aug. 8, 1945, art. 12, 59 Stat. 1548, 82 U.N.T.S. 290 ... 46
Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 344:
Art. 2, 47 Stat. 2031, 118 L.N.T.S. 357 31
Art. 3, 47 Stat. 2031, 118 L.N.T.S. 357 31
Art. 16, 47 Stat. 2036, 118 L.N.T.S. 363 31
Art. 42, 47 Stat. 2045, 118 L.N.T.S. 373 31
Art. 82, 47 Stat. 2059, 118 L.N.T.S. 391 32
Art. 86, 47 Stat. 2060, 118 L.N.T.S. 393 33
Art. 87, 47 Stat. 2061, 118 L.N.T.S. 393 34
Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 48
Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85 ... 48
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 48

Treaties, statutes, regulations, and rules—Continued: Page

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... 5, 6, 9, 26, 30, 37, 38, 19a

Art. 1, 6 U.S.T. 3318, 75 U.N.T.S. 136 ..... 32, 19a

Art. 2, 6 U.S.T. 3318, 75 U.N.T.S. 136 ..... 26, 38, 39, 40, 19a

Art. 3, 6 U.S.T. 3318, 75 U.N.T.S. 136 ..... 6, 10, 26, 48, 49, 20a

Art. 4, 6 U.S.T. 3320, 75 U.N.T.S. 138 ..... 6, 41, 21a

Art. 4(A)(1), 6 U.S.T. 3320, 75 U.N.T.S. 138 ..... 41, 42, 21a

Art. 4(A)(2), 6 U.S.T. 3320, 75 U.N.T.S. 138 ..... 41, 42, 21, 21a

Art. 4(A)(4), 6 U.S.T. 3320, 75 U.N.T.S. 138 ..... 41, 42, 22a

Art. 5, 6 U.S.T. 3322, 75 U.N.T.S. 140 ..... 5, 37, 42, 43, 24a

Art. 8, 6 U.S.T. 3324, 75 U.N.T.S. 144 ..... 33, 24a

Art. 11, 6 U.S.T. 3326, 75 U.N.T.S. 144 ..... 33, 25a

Art. 23, 6 U.S.T. 3336, 75 U.N.T.S. 154 27

Art. 102, 6 U.S.T. 3394, 75 U.N.T.S. 212 ..... 40, 41

Art. 132, 6 U.S.T. 3420, 75 U.N.T.S. 238 ..... 33, 25a

Art. 142, 6 U.S.T. 3424, 75 U.N.T.S. 242 26

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 39

Treaties, statutes, regulations, and rules—Continued: Page

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 39

Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650 .. 10, 17, 44, 45

Art. 15, 39 Stat. 653 ..... 17, 18, 23, 45

Art. 38, 39 Stat. 656 45

Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736 22

Act of Nov. 26, 1997, Pub. L. No. 105-118, § 583, 111 Stat. 2436 28

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 ..... 7, 16, 17, 18, 19, 30, 10a

Preamble, 115 Stat. 224 ..... 2, 16, 10a

§ 2(a), 115 Stat. 224 ..... 2, 11, 16, 24, 11a

Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739 ..... *passim*

§ 1005(e), 119 Stat. 2741 ..... 6, 5a

§ 1005(e)(2), 119 Stat. 2742 ..... 30, 37, 6a

§ 1005(e)(2)(C)(ii), 119 Stat. 2742 ..... 37, 7a

§ 1005(e)(3), 119 Stat. 2743 ..... 4, 6, 15, 43, 8a

§ 1005(e)(3)(A), 119 Stat. 2743 ..... 12, 15, 8a

§ 1005(e)(3)(B), 119 Stat. 2743 ..... 15, 8a

§ 1005(e)(3)(C), 119 Stat. 2743 ..... 12, 15, 8a

§ 1005(e)(3)(D) 119 Stat. 2743 ..... 12, 15, 8a

§ 1005(e)(3)(D)(ii), 119 Stat. 2743 ..... 37, 8a

§ 1005(g), 119 Stat. 2743 ..... 20, 8a

Statutes, regulations, and rules—Continued: Page

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 34

§ 1091(b)(4), 118 Stat. 2069 35

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* ..... *passim*

10 U.S.C. 802 (Art. 2) 19

10 U.S.C. 821 (Art. 21) ..... *passim*

10 U.S.C. 828 (Art. 28) 44

10 U.S.C. 836 (Art. 36) 5, 7, 8, 18, 44, 45, 1a

10 U.S.C. 836(a) (Art. 36(a)) 43, 44, 47

10 U.S.C. 839 (Art. 39) 5

10 U.S.C. 847-850 (Arts. 47-50) 44

10 U.S.C. 904 (Art. 104) 44

10 U.S.C. 906 (Art. 106) 44

War Crimes Act of 1996, 18 U.S.C. 2441 28

10 U.S.C. 3037(c) 20

10 U.S.C. 5148(d) 20

10 U.S.C. 8037(c) 20

18 U.S.C. 242 20

28 U.S.C. 1254(1) 4

28 U.S.C. 1331 36

28 U.S.C. 2241 36

32 C.F.R. Pt. 9 50

Section 9.4(c)(2) 4

Section 9.4(c)(2)(iii)(B) 4

Section 9.5(b) 4

Section 9.5(c) 4

Regulations and rules—Continued: Page
Section 9.5(f) 4
Section 9.5(h) 4
Section 9.5(i) 4
Section 9.5(k) 4, 46
Section 9.6(h) 4
International Criminal Tribunal for the Former Yugoslavia R.P. & Evid.:
Rule 80 46
Rule 89(c) 47
Miscellaneous:
William E. Berkhimer, *Military Government and Martial Law* (3d ed. 1914) 46
Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005) 19
151 Cong. Rec. S12,754 (daily ed. Nov. 14, 2005) 42
George B. Davis, *A Treatise on the Military Law of the United States* (1913) 21, 22
Ingrid Detter, *The Law of War* (2d ed. 2000) 25
G.I.A.D. Draper, *The Red Cross Conventions* (1958) 39
2B Final Record of the Diplomatic Conference of Geneva of 1949 39
Louis Fisher, Congressional Research Service, *Military Tribunals: The Quirin Precedent* (Mar. 26, 2002) <http://www.fas.org/irp/crs/RL31340.pdf> 47
H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949) 18
H.R. Rep. No. 698, 104th Cong., 2d Sess. (1996) 28

Miscellaneous—Continued: Page

Richard S. Hartigan, *Lieber's Code and the Law of War* (1963) 47

Charles Roscoe Howland, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912) ... 27

International Committee of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* (1960) 34, 42, 48

Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l L. Stud. 1 (1977) 33, 41

W. Thomas Mallison & Sally V. Mallison, *Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39 (1977) 41

Manual for Courts-Martial (2005) 45

Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 29, 2004) <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> 42

Military Commission Order No. 1 (Dep't of Def. Aug. 31, 2005) 4, 46

Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002) 2, 3, 7, 8, 13, 24, 47, 49, 12a

Restatement (Third) of the Foreign Relations Law of the United States (1987):

Vol. 1 31

Vol. 2 31

Miscellaneous—Continued: Page

S. Rep. No. 229, 63d Cong., 2d Sess. (1914) 17

S. Rep. No. 486, 81st Cong., 1st Sess. (1949) 17

S. Treaty Doc. No. 2, 100th Cong., 1st Sess. (1987) 40

U.S. Dep't of the Army et al., Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Nov. 1, 1997) 35, 42, 43

Uniform Code of Military Justice: Hearings Before Subcomm. No. 1 of the House Comm. on Armed Services on H.R. 2498, 81st Cong., 1st Sess. (1949) 47

Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) 31

William Winthrop, *Military Law and Precedents* (2d ed. 1920) 20, 22, 27, 46

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DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

JURISDICTION

For the reasons stated in respondents' motion to dismiss, the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, removes jurisdiction over this action and similar actions brought on behalf of Guantanamo detainees.

STATEMENT

For centuries, this Nation has invoked military commissions to try and punish captured enemy combatants for offenses against the law of war. Petitioner is a confirmed enemy combatant—indeed, an admitted personal assistant to Osama bin Laden—who was captured in Afghanistan in connection with ongoing hostilities and has been charged with violating the law of war. The court of appeals properly held that petitioner's pre-trial challenge to his military commission is without merit and that the district court's unprecedented injunction against that proceeding should be set aside.

1. On September 11, 2001, the Nation came under attack, and nearly 3000 innocent civilians lost their lives. In the wake of those savage attacks, Congress recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and authorized him to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, preamble and § 2a, 115 Stat. 224.

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network and the Taliban regime that supported it. In the course of those ongoing armed conflicts, the United States, consistent with settled practice, has seized numerous persons and detained them as enemy combatants. And the President, also consistent with historical practice, has ordered the establishment of military commissions to try members of al Qaeda and other captured enemy combatants for violations of the law of war. The President expressly found that, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order * * * to be detained, and when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." *Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002) (Military Order). In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code." *Ibid.*

2. a. In November 2001, petitioner was captured in Afghanistan during the course of active hostilities in that country and transferred to the control of the United States armed forces. After an extensive screening process, petitioner was determined to be an enemy combatant and transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention.

b. In July 2003, the President designated petitioner as an individual subject to the Military Order and eligible for trial before a military commission. The President found "that there is reason to believe that [petitioner] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 1a-2a. On July 13, 2004, the Appointing Authority for Military Commissions approved and referred to a military commission a charge alleging that petitioner conspired with Osama bin Laden, Ayman al Zawahiri, and other members and associates of al Qaeda to commit the offenses of "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Id.* at 65a. The charge alleges that petitioner served as bin Laden's bodyguard and personal driver, and that, in that capacity, he delivered weapons and ammunition to al Qaeda members and associates, transported weapons from Taliban warehouses to the head of al Qaeda's security committee, and drove bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. *Id.* at 65a-67a.

The charge also alleges that petitioner was aware during this period that bin Laden—who issued a *fatwa* in February 1998 under the banner of "International Islamic Front for Jihad on the Jews and Crusaders" commanding all able Muslims to kill Americans wherever they may be found—had launched terrorist attacks against American citizens and property, including the September 11 attacks. Pet. App. 64a-65a. Petitioner received terrorist training himself, learning

to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Id.* at 67a.

The charge against petitioner entitles him to numerous protections under the federal regulations governing military commissions. Petitioner is entitled to appointed military legal counsel, 32 C.F.R. 9.4(c)(2), and may retain a civilian attorney (which he has done), 32 C.F.R. 9.4(c)(2)(iii)(B). Petitioner is entitled to the presumption of innocence, 32 C.F.R. 9.5(b), proof beyond a reasonable doubt, 32 C.F.R. 9.5(c), and the right to remain silent, 32 C.F.R. 9.5(f). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial, 32 C.F.R. 9.5(k); Military Commission Order No. 1 (Dep't of Defense Aug. 31, 2005) § 6(B)(3) and (D)(5)(b). If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h). The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court. See DTA § 1005(e)(3), 119 Stat. 2743; 28 U.S.C. 1254(1).

c. In October 2004, petitioner was afforded the opportunity to contest his status as an enemy combatant before a Combatant Status Review Tribunal (CSRT) composed of three neutral officers. On October 3, 2004, after considering unclassified and classified exhibits, and petitioner's sworn affidavit and unsworn testimony at the hearing, the CSRT issued a decision confirming that petitioner was an enemy combatant who was "either a member of or affiliated with Al

Qaeda," and that he was therefore subject to continued detention. Pet. App. 2a, 31a.

3. Petitioner filed a petition for habeas corpus or mandamus in the District Court for the Western District of Washington. He sought to enjoin enforcement of the Military Order on the ground that trial before a military commission rather than a court-martial would be unconstitutional and would violate the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention, 1949 Convention, or Convention). J.A. 37-65. While petitioner acknowledged that he worked for bin Laden for many years before his capture, J.A. 50, he alleged that he had not knowingly participated in terrorist attacks against the United States, J.A. 46, 51. The district court transferred the case to the District Court for the District of Columbia. J.A. 143-150.

On November 8, 2004, one month before petitioner's scheduled trial date, J.A. 182, the district court rejected the government's argument that it should abstain from interfering with the impending trial, and enjoined the military commission proceedings on the ground that the trial would violate Article 5 of the Geneva Convention and Article 39 of the UCMJ, 10 U.S.C. 839. Pet. App. 20a-49a.

4. The court of appeals reversed. Pet. App. 1a-18a. The court declined to abstain but rejected petitioner's claims on the merits. First, the court held that Congress had authorized petitioner's military commission through the AUMF and Articles 21 and 36 of the UCMJ, 10 U.S.C. 821, 836. Pet. App. 4a-7a. Next, the court rejected petitioner's argument based on the Geneva Convention. It explained that the Geneva Convention did not create judicially enforceable rights, but that, even if it did, "the Convention does not apply to al Qaeda and its members." *Id.* at 11a. The court further noted that peti-

tioner "does not purport to be a member of a group" that would qualify for prisoner-of-war (POW) status under Article 4 of the Convention, and that, in any event, petitioner could raise such a claim "before the military commission." *Ibid.* The court also rejected petitioner's reliance on Article 3 of the Convention. *Id.* at 12a. The court explained that the President had determined that this provision was inapplicable to the conflict with al Qaeda, and concluded that the President's determination was entitled to respect. *Id.* at 13a. Finally, the court rejected petitioner's argument that he was entitled to the same procedures established by the UCMJ for courts-martials, reasoning that the UCMJ itself "takes care to distinguish between 'courts-martial' and 'military commissions.'" *Id.* at 14a.

Judge Williams concurred "in all aspects of the court's opinion" except one. Pet. App. 16a. He believed that Article 3 was applicable to the conflict with al Qaeda. *Id.* at 17a. But because he agreed that the Geneva Convention is not judicially enforceable and that any claims under Article 3 should be deferred until the completion of military commission proceedings, Judge Williams "fully agree[d] with the court's judgment." *Ibid.*

5. After the Court granted certiorari in this case, Congress enacted the Detainee Treatment Act of 2005. Among other things, the DTA explicitly removes the jurisdiction of the federal courts over habeas and other actions brought by Guantanamo detainees. § 1005(e), 119 Stat. 2741. In place of such jurisdiction, the DTA grants the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review challenges brought by Guantanamo detainees to *final* decisions by military commissions or CSRTs. § 1005(e)(3), 119 Stat. 2743.

SUMMARY OF ARGUMENT

I. Petitioner's pre-trial challenge to his military commission is jurisdictionally foreclosed by the Detainee Treatment Act of 2005 and fatally premature. The DTA removes jurisdiction over a broad class of actions by Guantanamo detainees, including this action, and establishes an exclusive review mechanism for challenging the *final* decisions of CSRTs or military commissions in the District of Columbia Circuit. The DTA establishes a statutory rule of abstention that eliminates all jurisdiction over petitioner's pre-trial complaints about his military commission. The DTA thus reinforces the military abstention doctrine of *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), and makes clear that dismissal of this action is warranted. Abstention is especially appropriate here because the armed conflict against al Qaeda remains ongoing and because Congress itself has determined that post-conviction judicial review is appropriate and sufficient.

II. The President had ample authority to convene the military commission against petitioner. Indeed, the DTA itself conclusively demonstrates that Congress is aware that the President has convened military commissions in the current conflict and that Congress recognizes his authority to do so. That recognition is well-founded. As the President found in his Military Order establishing military commissions, the AUMF and two provisions of the UCMJ, 10 U.S.C. 821, 836, recognize the President's authority to convene military commissions. The AUMF authorized the President "to use all necessary and appropriate force" against al Qaeda and its supporters. As a plurality of this Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the AUMF thus authorized the President to exercise his full war powers in connection with the conflict against al Qaeda, including the authority necessary for "the capture, detention, *and trial* of unlawful

combatants." *Id.* at 518 (emphasis added). Like the detention of captured enemy combatants, the trial of such combatants by military commission "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate' force Congress has authorized the President to use." *Ibid.*

Article 21 of the UCMJ, 10 U.S.C. 821, provides that the extension of court-martial jurisdiction "do[es] not deprive military commissions[] * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." In *Ex parte Quirin*, 317 U.S. 1 (1942), this Court construed the materially identical statutory precursor to Article 21 to authorize the President to convene military commissions to try offenses against the law of war. Article 36 of the UCMJ, 10 U.S.C. 836, authorizes the President to prescribe rules for military commissions, and to depart from the "principles of law and the rules of evidence" applicable in ordinary criminal trials when "he considers" those rules not "practicable." Article 36 thus recognizes both the President's authority to structure the military commission and his need for flexibility in doing so. And, of course, the DTA makes clear that Congress has ratified the use of military commissions in this context.

Even if Congress's support for the President's Military Order were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—even in the absence of any statutory authorization. Indeed, military commissions have been convened by the President in numerous conflicts since the founding and have often been used during wartime without congressional authorization. The President's authority in this realm not only provides an independent basis for rejecting petitioner's challenge, but strongly counsels against reading the UCMJ to restrict the Commander in Chief's abil-

ity in wartime to hold enemy fighters accountable for violating the law of war.

Nor is there any basis for concluding that the President lacks the authority to convene a military commission against *petitioner*. The Geneva Convention does not preclude the trial of petitioner by military commission. As a threshold matter, the Convention does not create private rights enforceable in domestic courts and thus is of no assistance to petitioner in this action. The longstanding presumption is that treaties or international agreements do not create judicially enforceable individual rights. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court concluded that a previous version of the Geneva Convention did not confer privately enforceable rights and that enforcement of the treaty is instead a matter of State-to-State relations. Nothing in the text or history of the current version of the Convention suggests that the President or the Senate intended to take the radical step of creating judicially enforceable rights. Nor do any of the provisions of domestic law on which petitioner relies, including the habeas statute, transform the Convention into a judicially enforceable international instrument.

Even if the Convention were judicially enforceable, it still would not aid petitioner. The President has determined that members and affiliates of al Qaeda, such as petitioner, are not covered by the Geneva Convention. That determination represents a core exercise of the President's Commander-in-Chief and foreign affairs powers during wartime and is entitled to be given effect by the courts. Moreover, the President's determination is supported by the plain text of the Geneva Convention articles defining the treaty's scope. Furthermore, petitioner clearly does not satisfy the relevant requirements in the Convention for POW status, which is determined by reference to the characteristics of the belligerent force (in this case, al Qaeda), not the individual. And a CSRT

has rejected petitioner's claim that he is a non-combatant, determining instead that petitioner (an admitted personal assistant to bin Laden) was an enemy combatant affiliated with al Qaeda.

The nature of the offense with which petitioner has been charged—conspiracy—also is no bar to proceeding against him by military commission. Conspiracy has been prosecuted as a war crime throughout our Nation's history, and that long-standing practice defeats petitioner's claim.

III. Petitioner's pre-trial objections to the military commission's procedures are equally meritless. The rules established by the UCMJ for courts-martial do not govern military commissions. The UCMJ does not purport to establish a comprehensive set of rules for military commissions. Instead, it takes pains to distinguish "military commissions" or "military tribunals" from the comprehensively regulated "courts-martial," and, reflecting Congress's traditional hands-off approach to military commissions (in contrast to courts-martial), imposes only a handful of requirements on those commissions. Article 3 of the Geneva Convention does not entitle petitioner to additional procedures either. Like the rest of the Geneva Convention, Article 3 is not individually enforceable. In any event, the President has determined that Article 3 does not apply to the conflict with al Qaeda, and the text and history of Article 3 confirms the correctness of that determination.

ARGUMENT

Since the founding of this Nation, the United States has used military commissions during armed conflicts to try violations of the law of war. Ninety years ago, in revising the Articles of War, Congress recognized that historic practice and approved its continuing use. And this Court upheld the use of military commissions during and after World War II in cases involving a presumed American citizen Nazi saboteur cap-

tured in the United States, *Ex parte Quirin*, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, *In re Yamashita*, 327 U.S. 1 (1946); German nationals who claimed that they worked for civilian agencies of the German government in China, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); and even the wife of an American serviceman posted in occupied Germany, *Madsen* v. *Kinsella*, 343 U.S. 341 (1952).

Facing an enemy today characterized by its systematic disregard for the law of war and for the lives of innocent civilians, such as the victims of the September 11 attacks, Congress authorized the President to use his traditional war powers "to prevent any future acts of international terrorism against the United States" by al Qaeda and its supporters. AUMF § 2(a), 115 Stat. 224. Soon after, and in express reliance on that authorization and on provisions of the UCMJ, the President ordered the establishment of military commissions to try violations of the law of war in the ongoing armed conflict with al Qaeda. What is more, Congress recently ratified the President's decision to convene such military commissions in the DTA, which establishes an exclusive review mechanism in the District of Columbia Circuit for challenges to the final decisions of military commissions. That is self-evidently not the legislation Congress would have enacted if it viewed the commissions as *ultra vires* or defective in ways that demanded pre-trial correction. The only plausible conclusion is that Congress has interposed no objection to the President's decision to convene military commissions in the current conflict, including the commission at issue in this case.

Neither petitioner nor his amici have provided any basis for the Court to disregard the time-honored practice of trying and punishing captured enemy combatants by military commissions, as reflected in this Court's decisions recognizing the validity of military commissions in prior conflicts and the vari-

ous statutes in which Congress has expressed its approval of the President's decision to use military commissions both more generally and in the current conflict specifically.

I. THIS PRE-TRIAL CHALLENGE TO PETITIONER'S MILITARY COMMISSION IS JURISDICTIONALLY FORECLOSED AND FATALLY PREMATURE

First and foremost, as explained at length in respondents' motion to dismiss, the DTA immediately eliminates jurisdiction over this action and establishes an exclusive review mechanism in the District of Columbia Circuit for challenges to "final decisions" rendered by military commissions. See § 1005(e)(3)(A), (C) and (D), 119 Stat. 2743. The DTA thus amounts to a statutory rule of abstention that precludes review of ongoing military proceedings and requires detainees to await an adverse decision before seeking judicial review. The plain terms of the statute require the dismissal of petitioner's pre-trial challenge for lack of jurisdiction.

Second, even if the DTA did not apply to this case, abstention would be appropriate under the established judge-made rule that civilian courts should await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings. See *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). In *Councilman*, this Court explained that the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. *Id.* at 757 (citation omitted). The Court held that even a case with relatively limited potential for interference with military action—the prosecution of a serviceman for possession and sale of marijuana—implicated "unique military exigencies" of "powerful" and "contemporary vitality." *Ibid.* These exigencies, the Court held, should generally preclude a court from

entertaining "habeas petitions by military prisoners unless all available military remedies have been exhausted." *Id.* at 758.

The abstention rule of *Councilman* applies *a fortiori* where, as here, the President, acting in his capacity as Commander in Chief and in express reliance on congressional authorization, established the military commissions at issue upon finding that they are "necessary" for "the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Because the Military Order applies to alien enemy combatants who are captured during the ongoing war with al Qaeda, both the traditional deference this Court pays to the military justice system and the vital role played by that system are at their pinnacle. See *Yamashita*, 327 U.S. at 11 ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations"); *Hirota* v. *MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring) ("punishment of war criminals * * * dilut[es] enemy power and involv[es] retribution for wrongs done").

The two grounds on which the court below distinguished *Councilman* do not render it inapplicable. First, *Quirin*, on which the court of appeals relied, does not provide a basis for distinguishing *Councilman*, because it predated *Councilman* by over 30 years. In addition, *Quirin* did not involve the *enjoining* of a military commission, but did involve a presumed American citizen facing an imminent death penalty. Moreover, the United States did not request abstention in that case. Cf. *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) (noting that "the existence of unaddressed jurisdictional defects has no precedential effect"). This case, by contrast, involves an alien enemy combatant captured abroad who does not face the death penalty and who may seek judicial review if an adverse decision is rendered.

Second, the court of appeals suggested that abstention was inappropriate because, in its view, the petition raised a substantial challenge to the military commission's jurisdiction. In *Councilman*, however, this Court made clear that there was no general exception to the military abstention doctrine for a "jurisdictional challenge." See 420 U.S. at 741-742, 758-759. Indeed, *Councilman* itself involved a jurisdictional challenge. To be sure, in *Councilman*, the Court recognized an exception for cases in which American civilians make substantial claims that the military has no authority over them at all. *Ibid.* (citing *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employees); *Reid* v. *Covert*, 354 U.S. 1 (1957) (wives of servicemen); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (ex-serviceman)). This case, by contrast, involves a confirmed alien enemy combatant with no ties to the United States—other than his alleged participation in a conspiracy to kill Americans. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (stating that an alien with no voluntary ties to the United States can "derive no comfort" from *Reid*); *Councilman*, 420 U.S. at 759 (explaining that the exception to abstention "turn[s] on the status of the persons as to whom the military asserted its power").

But even if the grounds identified by the court of appeals would suffice to render the judicial abstention doctrine of *Councilman* inapplicable, they do not justify ignoring the statutory abstention principles embodied in the DTA. Nothing in *Quirin*, *McElroy*, *Reid*, or *Toth* suggests that there could be a constitutional basis for disregarding a congressional requirement that the challenge to a military proceeding await a final determination, even in the context of a citizen, much less a confirmed alien enemy combatant. There is, therefore, no basis for overriding Congress's judgment that commissions have sufficient authority to render a "final deci-

sion," and that judicial review should await such a decision. See DTA § 1005(e)(3), 119 Stat. 2743.

II. THE PRESIDENT HAS AMPLE AUTHORITY TO CONVENE MILITARY COMMISSIONS TO TRY AND PUNISH AL QAEDA COMBATANTS SUCH AS PETITIONER

Petitioner's central submission is that the President lacked the authority to establish military commissions to try and punish captured enemy combatants in the ongoing armed conflict against al Qaeda. That contention is refuted by Congress's actions, this Court's precedents, and the war powers vested in the President by the Constitution.

A. Congress Has Authorized The Use Of Military Commissions In The Armed Conflict With Al Qaeda

1. Congress's most recent action in this area—the Detainee Treatment Act of 2005—alone defeats petitioner's claim that the military commissions are not authorized. In the DTA, Congress expressly recognized and ratified the latest Military Order governing the use of military commissions in the specific context of the current conflict and established an exclusive mechanism for individuals such as petitioner to obtain judicial review of final decisions issued by military commissions. See § 1005(e)(3)(A) and (C), 119 Stat. 2743. The DTA also delineates restrictions on judicial review of military commissions, differentiating the review available based on the length of the sentence a defendant receives. See § 1005(e)(3)(B) and (D), 119 Stat. 2743. Petitioner's contention that the military commissions are not authorized by Congress is irreconcilable with the DTA. The DTA reflects Congress's judgment that the current military commissions are neither *ultra vires* nor too deficient to be allowed to proceed to render a final decision. In any event, as the court of appeals correctly concluded based on pre-DTA enactments, Con-

gress has independently authorized the use of military commissions in the current conflict.

2. a. In the AUMF, Congress authorized the use of military commissions in the ongoing conflict against al Qaeda. Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF preamble, 115 Stat. 224, and authorized the President "to use all necessary and appropriate force against those nations, *organizations*, or *persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent any future acts of international terrorism against the United States," AUMF § 2a, 115 Stat. 224 (emphasis added).

In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), a plurality of this Court concluded that the AUMF authorized the President to exercise his traditional war powers, and it relied on *Quirin* for the proposition that "the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 518 (quoting *Quirin*, 317 U.S. at 28, 30) (emphasis added). Likewise, in *Yamashita*, the Court explained that an "important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." 327 U.S. at 11; see *Hirota*, 338 U.S. at 208 (Douglas, J., concurring) (noting that the Article II power includes the power "to punish those enemies who violated the law of war," which "is a part of the prosecution of war"). Because "[t]he trial and punishment of enemy combatants" (*Yamashita*, 327 U.S. at 11) is a fundamental incident of war, it follows that, in authorizing the President "to use all necessary and appropriate force" against al Qaeda, the

AUMF authorized the use of military commissions against enemy combatants, such as petitioner.

b. Congress has not only authorized the President to exercise his traditional war powers in the specific context of the armed conflict with al Qaeda; it has also specifically recognized his ongoing authority to invoke military commissions when he deems them necessary. Article 21 of the UCMJ, 10 U.S.C. 821, states that "[t]he provisions [of the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by the law of war may be tried by military commissions." That language originated in, and is identical in all material respects to, Article 15 of the Articles of War, which were enacted during World War I. See Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650 (Articles of War). In the Articles of War, Congress extended the jurisdiction of courts-martial to offenses and offenders that had traditionally fallen within the jurisdiction of military commissions, while preserving the institution and jurisdiction of the commissions. See *Madsen*, 343 U.S. at 349-355. The main proponent of Article 15 testified that, as Congress was extending the jurisdiction of courts-martial, it was vital to make clear that the military commissions' "common law of war jurisdiction was not ousted." S. Rep. No. 229, 63d Cong., 2d Sess. 53, 98-99 (1914) (testimony of Judge Advocate General Crowder).

Moreover, this Court has construed Article 15 as having "*authorized* trial of offenses against the laws of war before such commissions." *Quirin*, 317 U.S. at 29 (emphasis added). Although the language of this authorization in Article 15 seems indirect, that simply recognizes that Congress was adding its imprimatur to a practice with a long history which did not depend on express statutory authorization. When Congress enacted Article 21 of the UCMJ, it merely recodified Article 15 of the Articles of War. See S. Rep. No.

486, 81st Cong., 1st Sess. 13 (1949) (explaining that Article 21 of the UCMJ "preserve[s]" Article 15 of the Articles of War, which "has been construed by the Supreme Court"); H.R. Rep. No. 491, 81st Cong., 1st Sess. 17 (1949) (same). Consequently, this Court's interpretation of Article 15 controls the interpretation of Article 21. See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

c. Article 36 of the UCMJ, 10 U.S.C. 836, provides even further statutory recognition of the President's authority to use military commissions. It authorizes the President to establish procedures "for cases arising under this chapter triable in * * * military commissions." That provision also grants the President broad discretion in establishing the rules for proceedings before military commissions, expressly providing that the President may adopt rules that depart from "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," when "he considers" application of those rules to be not "practicable."

3. Petitioner's attempts to undermine the obvious import of those congressional enactments are unavailing. The fact that Congress has not issued a formal declaration of war against al Qaeda is irrelevant. The President's prerogative to invoke the law of war in a time of armed conflict, including with respect to the trial and punishment of war criminals, in no way turns on the existence of such a declaration. See, *e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1862). The Court in *Hamdi* rejected a similar contention and found that the AUMF was sufficient to confirm Congress's support for the President's exercise of his war powers. See 542 U.S. at 518 (plurality opinion); *id.* at 587 (Thomas, J., dissenting).

In addition, none of the UCMJ provisions that recognize the President's authority to convene military commissions requires a formal declaration of war, and it is settled that the

UCMJ applies to armed conflicts that the United States has prosecuted without a formal declaration of war. See, *e.g.*, *United States* v. *Anderson*, 38 C.M.R. 386, 387 (C.M.A. 1968) (Vietnam); *United States* v. *Bancroft*, 11 C.M.R. 3, 5-6 (C.M.A. 1953) (Korea).[1] The case on which petitioner relies (Br. 32-33 n.23) for the contrary proposition, *United States* v. *Averette*, 41 C.M.R. 363 (C.M.A. 1970), is inapposite. That case interpreted the phrase "in time of war" as used in *Article 2* of the UCMJ as applied to a civilian accompanying the U.S. Armed Forces who was subjected to a court-martial. *Id.* at 365-366. The UCMJ provisions discussed above authorizing military commissions do not contain the limiting phrase "in time of war," and petitioner is not a civilian like the defendant in *Averette*, but a confirmed enemy combatant.

Petitioner also errs in arguing (Br. 17) that the use of military commissions is not "necessary" to prevent terrorism and therefore unauthorized by the AUMF. This Court has recognized that courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war. See, *e.g.*, *The Prize Cases*, 67 U.S. (2 Black) at 670 (stating that the President "must determine what degree of force the crisis demands"). In any event, this Court has also recognized the general principle, in *Quirin*, *Yamashita*, and other cases, that trying unlawful combatants for violating the law of war is a fundamental part of the conduct of the war itself. The punishment of persons who have violated the law of war is an appropriate and time-honored means of deterring or incapacitating them from do-

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[1] See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2129 (2005) (noting that military commissions were used in connection with the Civil War and conflicts with Indian tribes).

ing so again, and of discouraging others from doing so in the future.[2]

B. The Constitution Authorizes The President To Establish Military Commissions To Try Al Qaeda Combatants

Congress's multiple authorizations of the President's use of military commissions in the ongoing conflict with al Qaeda obviate the need to consider the President's inherent authority to act in the absence of such authorization. See *Hamdi*, 542 U.S. at 518 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Nevertheless, the President undoubtedly possesses that authority, as history, Congress's enactments, and this Court's precedents make clear.

As this Court has noted, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States."

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[2] Petitioner suggests (Br. 24) that the President's Military Order establishing military commissions violates two federal statutes. First, he points to 10 U.S.C. 3037(c), which directs the Judge Advocate General (JAG) of the Army to "receive, revise, and have recorded the proceedings of courts of inquiry and military commissions." That statute, phrased as a directive to the JAG, does not create privately enforceable rights. But in any event, Section 3037(c), like analogous provisions for other branches of the armed services, see 10 U.S.C. 5148(d) (Navy); 10 U.S.C. 8037(c) (Air Force), does not apply to military commissions convened by the President, but only commissions convened by a particular service. Second, petitioner points to 18 U.S.C. 242, a criminal statute that prohibits various forms of discriminatory conduct against aliens. But that statute is facially inapplicable because petitioner is not a "person in any State, Territory, Commonwealth, Possession, or District" within its meaning. See DTA § 1005(g), 119 Stat. 2743 (expressly providing that Guantanamo Bay is outside the United States). Moreover, that statute does not purport to regulate the conduct of the United States toward aliens, which is addressed in detail by immigration statutes that routinely treat aliens differently, cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (noting virtually plenary authority over aliens), much less in the context of the President's treatment of captured enemy combatants during active hostilities. In any event, this argument has been forfeited because it was not presented to the court of appeals.

Eisentrager, 339 U.S. at 788. The President's war power under Article II, Section 2, of the Constitution includes the inherent authority to create military commissions even in the absence of any statutory authorization, because that authority is a necessary and longstanding component of his war powers. See *ibid.* (noting that, "of course, grant of war power includes all that is necessary and proper for carrying these powers into execution"). The war power thus includes "the power * * * to punish those enemies who violated the law of war," because that power is "part of the prosecution of the war" and "a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done." *Hirota*, 338 U.S. at 208 (Douglas, J., concurring) (citation omitted); see *Yamashita*, 327 U.S. at 11; *Quirin*, 317 U.S. at 28, 30.

When the Constitution was written and ratified, it was well recognized that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the law of war. For example, during the Revolutionary War, George Washington, as commander in chief of the Continental Army, appointed a "Board of General Officers" to try the British Major John Andre as a spy. See *Quirin*, 317 U.S. at 31 n.9. At the time, there was no provision in the American Articles of War for court-martial proceedings to try an enemy for the offense of spying. See George B. Davis, *A Treatise on the Military Law of the United States* 308 n.1 (1913). At a minimum, in investing the President with the authority to be Commander in Chief, the framers surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the law of war.

The well-established executive practice of using military commissions confirms this conclusion. Throughout our Nation's history, Presidents have exercised their inherent

commander-in-chief authority to establish military commissions without any specific authorization from Congress. See Winthrop, *supra*, at 831 ("In general, * * * [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war."). For example, during the Mexican-American War in the 1840s, tribunals called "council[s] of war" were convened to try offenses under the law of war; other tribunals, called "military commission[s]," were created to administer justice in occupied areas. See, *e.g.*, Davis, *supra*, at 308; Winthrop, *supra*, at 832-833. Likewise, during the Civil War, military commissions were convened to try offenses against the law of war, despite the lack of statutory authorization. See Davis, *supra*, at 308 n.2; Winthrop, *supra*, at 833.[3]

As this Court has repeatedly explained, "'traditional ways of conducting government . . . give meaning' to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (citation omitted), and "[t]he construction placed upon the Constitution * * * by the men who were contemporary with its formation" is "almost conclusive," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936) (citation omitted); accord *Quirin*, 317 U.S. at 41-42. The historical practice of the President's use of military commissions in time of armed conflict therefore strongly (if not conclusively) confirms the existence of that war power.

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[3] In 1863, Congress did endorse the use of military commissions to try members of the military for certain offenses committed during time of war. See Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736. That statute, however, did not purport to establish military commissions; instead, it acknowledged their existence as a matter of inherent executive authority (and sanctioned their use as alternatives to courts-martial in some cases). See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249 (1864) ("In the armies of the United States, * * * cases which do not come within the * * * jurisdiction conferred by statute or court-martial, are tried by *military commissions*.").

The President's inherent authority to establish military commissions is reflected in the actions of Congress and the courts in this context. The elliptical manner in which Congress acknowledged military commissions and left them undisturbed in Article 21 of the UCMJ—as opposed to authorizing them directly in plain terms of affirmative authorization—acknowledges that congressional authorization was not necessary and was not present during most of the first 125 years during which the executive employed such commissions. Likewise, as this Court explained in *Quirin*, "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress." 317 U.S. at 25. Petitioner has not come remotely close to making the necessary showing that Congress intended to *limit* the President's inherent authority to establish military commissions in this context.[4]

C. Al Qaeda's Wholesale Disregard For The Law Of War Does Not Exempt It From Punishment For Violations Of The Law Of War

Petitioner contends (Br. 30-36) that the law of war does not apply to the current conflict with al Qaeda, a foreign terrorist organization that engages in systematic violations of the law of war to accomplish its ideological and political goals. That contention is seriously mistaken.

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[4] Petitioner states (Br. 12) that *Quirin* held that the "authority to establish commissions rests with Congress." *Quirin*, however, expressly declined to settle questions about the relative powers of the political branches over military commissions in a case in which both the President and Congress (through Article 15 of the Articles of War) had sanctioned their use.

The Constitution vests in the President the authority to determine whether a state of armed conflict exists against an enemy to which the law of war applies. See *The Prize Cases*, 67 U.S. (2 Black) at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."); see also *Eisentrager*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948) (explaining that whether a "state of war" exists is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *The Three Friends*, 166 U.S. 1, 63 (1897) (noting that "it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted").

The President's determination that "members of al Qaida * * * have carried out attacks * * * on a scale that has created a state of armed conflict," Military Order § 1(a), is thus conclusive in establishing the applicability of the law of war to the conflict. Moreover, Congress itself determined that the law of war was applicable to al Qaeda when it authorized the President to use all "necessary and appropriate force" against the "nations, organizations, or persons he determines" were responsible for the September 11 attacks or those who "aided" them. AUMF § 2a, 115 Stat. 224. There is

no basis for this Court to invalidate the judgments made by both political branches that the law of war applies to al Qaeda.

In any event, those judgments were correct. It is well established that the law of war fully applies to armed conflicts involving groups or entities other than traditional nation-states. See *The Prize Cases*, 67 U.S. (2 Black) at 666 (noting that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states"); Ingrid Detter, *The Law of War* 134 (2d ed. 2000) (observing that "non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants"). Any contrary conclusion in this case would blink reality in view of the fact that al Qaeda has repeatedly declared itself an enemy of the United States, and has inflicted damage on a scale that exceeds previous attacks on our soil by nation-states, and in a manner that, by any common-sense understanding, constitutes an act of war. There is no doubt that al Qaeda's attacks against American civilians and military targets (including an attack on the headquarters of the Nation's Department of Defense) have triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda.

Petitioner identifies several purported distinctions between this conflict and other wars, but none of them is material. For example, petitioner asserts (Br. 31) that the conflict with al Qaeda is "potentially unlimited in scope [and] duration." That assertion, however, underestimates this Nation's capabilities and resolve and was no less true of World War II from the perspective of 1941. Moreover, the fact that the endpoint of the conflict with al Qaeda is not immediately in sight supports holding its combatants accountable for their war crimes in a manner that promotes, rather than compromises, other efforts to prosecute the war and bring the conflict to an end.

Petitioner suggests (Br. 35) that, if the Geneva Convention does not apply to al Qaeda, the law of war does not apply either. That suggestion is baseless. There is no field preemption under the Geneva Convention. The Convention seeks to *regulate* the conduct of warfare to which it applies with respect to nation-states that have entered the Convention and agreed to abide by its terms, but it does not purport to apply to every armed conflict that might arise or to crowd out the common law of war. Instead, as explained below, the Convention applies only to those conflicts identified in Articles 2 and 3. If an armed conflict, therefore, does not fall within the Convention, the Convention simply does not regulate it. Nothing in the Convention prohibits a belligerent party from applying the law of war to a conflict to which the Convention does not apply.[5]

D. Petitioner's Case-Specific And Treaty-Based Objections To His Military Commission Lack Merit

Because the President clearly has the constitutional and statutory authority to convene military commissions to try al Qaeda combatants, and because the law of war clearly applies to the ongoing armed conflict with al Qaeda, petitioner is reduced to arguing that *his* particular military commission is not authorized. Petitioner's various arguments in this respect are no more availing than his broad-based attacks.

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[5] Cf. Geneva Convention art. 142, 6 U.S.T. at 3424, 75 U.N.T.S. at 242 (noting that a denunciation of the Convention by a High Contracting Party "shall have effect only in respect of the denouncing Power" and "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience").

1. Military commissions may be and long have been convened outside the zone of combat

Petitioner contends (Br. 10, 26-27 n.18) that his commission is invalid because it is located outside a zone of combat or occupied territory. That contention is unsound. The commission in *Quirin* was held in Washington, D.C., while the commission in *Yamashita* was held in the Philippines, which was a U.S. territory at the time. Moreover, although military commissions authorized to administer civil law generally (*i.e.*, to maintain law and order) are naturally convened in the territory being occupied, there is no requirement that commissions established for the much narrower purpose of prosecuting violations of the law of war must be confined to a war zone. *Quirin* plainly did not impose such a requirement; the UCMJ was enacted against the backdrop of *Quirin*; and such a requirement would only invite unnecessary risks for all involved. Cf. 1949 Convention art. 23, 6 U.S.T. at 3336, 75 U.N.T.S. at 154 (providing that "[n]o prisoner of war may at any time be * * * detained in areas where he may be exposed to the fire of the combat zone").

2. The offense of conspiracy may be and long has been tried before a military commission

Petitioner contends (Br. 28-30) that conspiracy, the offense with which he has been charged, is not a cognizable offense under the law of war. That is not so. Individuals have been tried before military commissions for conspiracy to commit war crimes throughout this Nation's history. The *Quirin* saboteurs were charged with conspiracy, see 317 U.S. at 23, as was another Nazi saboteur whose convictions were subsequently upheld, see *Colepaugh* v. *Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957). See generally Winthrop, *supra*, at 839 & n.5 (listing conspiracy offenses prosecuted by military commissions); Charles Roscoe How-

land, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912) (noting that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was an offense against the law of war that was "punished by military commissions" throughout the Civil War). That long-standing practice suffices to defeat petitioner's claim.

Petitioner argues that Congress covered the field of war crimes in enacting the War Crimes Act of 1996 (18 U.S.C. 2441) and the Expanded War Crimes Act of 1997 (Act of Nov. 26, 1997, Pub. L. No. 105-118, § 583, 111 Stat. 2436). But those Acts were intended to *supplement* the jurisdiction of military commissions over war crimes. See, *e.g.*, H.R. Rep. No. 698, 104th Cong., 2d Sess. 12 (1996) ("The enactment of [the War Crimes Act of 1996] is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the [UCMJ] or under the law of war or the law of nations."). The Acts therefore say nothing about altering the preexisting jurisdiction of military commissions. See, *e.g.*, *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (noting "the cardinal rule . . . that repeals by implication are not favored") (citation omitted).

3. As a non-citizen enemy combatant, petitioner may be tried before a military commission

Notwithstanding his capture in a foreign combat zone, the CSRT's determination that he is an enemy combatant, and this Court's decisions in *Quirin* and *Hamdi*, petitioner invokes *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), to contend (Br. 25) that his military commission is not authorized because he is a civilian. *Milligan* is wholly inapposite. *Milligan* involved the military prosecution of an American citizen "in civil life, in nowise connected with the military service." 71 U.S. at 121-122. In *Quirin*, this Court "construe[d]" the "inapplicability of the law of war to [defendant's] case as having

particular reference to the facts": namely, that the defendant in *Milligan*, as a person who was not "a part of or associated with the armed forces of the enemy," was a "non-belligerent." 317 U.S. at 45. And in *Hamdi*, a majority of this Court rejected a far more plausible invocation of *Milligan*, by an American citizen, and reaffirmed *Quirin*. See 542 U.S. at 523 (plurality opinion) ("*Quirin* was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have."); *id.* at 593 (Thomas, J., dissenting) ("*Quirin* overruled *Milligan* to the extent that those cases are inconsistent.").[6]

Petitioner contends that he should be considered a non-belligerent like the defendant in *Milligan*, rather than an enemy combatant like the defendants in *Quirin*, because he contests his combatant status. But the *Hamdi* plurality refused to limit *Quirin* to cases in which enemy-combatant status was conceded, noting that the AUMF authorizes the United States to detain even *citizen* enemy combatants captured in a foreign combat zone and concluding that "whether [enemy-combatant status] is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point." 542 U.S. at 523. Petitioner is an *alien* enemy combatant captured abroad. Because a CSRT found that petitioner had the status of an enemy combatant (as either a member or an affiliate of al Qaeda), see Pet. App. 2a, 31a, petitioner squarely falls within the four corners of the

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[6] Petitioner seeks (Br. 26 n.17) to distinguish *Quirin* on the ground that two of the four charges (Counts 2 and 3) were statutorily authorized to be tried by military commission. But *Quirin* upheld the commission's authority to try the individuals based *solely* on the common-law-of-war charge (Count 1). Indeed, *Quirin* noted that, through Article 15 of the Articles of War, Congress had recognized the military's ability to enforce common-law rules of warfare which Congress had chosen not to codify in detail. 317 U.S. at 30.

AUMF and is properly subject to military jurisdiction under *Hamdi* and *Quirin*.[7]

4. Petitioner's treaty-based objections lack merit

Petitioner argues (Br. 36) that subjecting him to a military commission would violate the Geneva Convention. For several reasons, that argument is mistaken.

a. The Geneva Convention does not give rise to judicially enforceable rights

i. As the court of appeals held, the Geneva Convention is not individually enforceable. Pet. App. 10a. The long-established presumption is that treaties and other international agreements do not create judicially enforceable rights. As the Court has observed: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). When a violation of a treaty nonetheless occurs, it "becomes the subject of international negotiations and reclamations," not of judicial redress. *Ibid.*; see *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *Foster* v. *Neilson*, 27 U.S. (2 Pet.)

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[7] Petitioner claims (Br. 27) that respondents did not establish his enemy-combatant status until this case was on appeal. That is incorrect. The military determined that petitioner was an enemy combatant through a careful screening process that resulted in his transfer to Guantanamo. In addition, the government informed the district court of the CSRT's determination. See J.A. 182. Notwithstanding petitioner's argument to the court of appeals that the CSRT's determination was "not part of the Record," Pet. C.A. Br. 45, the court of appeals noted the determination (and relied on it), see Pet. App. 2a, 11a. Petitioner nevertheless inexplicably refuses to acknowledge the CSRT's determination that he is an enemy combatant. If petitioner disagrees with that determination, he may challenge it pursuant to the exclusive review procedures established by the DTA, see § 1005(e)(2), 119 Stat. 2742, but there is no basis for this Court to ignore that determination in deciding this case.

253, 306 (1829); see generally U.S. Br. at 11-16, *Bustillo* v. *Johnson*, No. 05-51 (to be argued March 29, 2006).

To be sure, treaties can, and on occasion do, create judicially enforceable private rights. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002); *United States* v. *De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir.), cert. denied, 531 U.S. 956 (2000). That background principle applies even when a treaty benefits private individuals. See 2 Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987) ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private right of action in domestic courts."). And it applies wholly apart from whether the treaty is self-executing (*i.e.*, whether the treaty requires implementing legislation to be given effect). See 1 *id.* § 111 cmt. h, at 47; Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995).

In *Eisentrager*, this Court held that captured Nazi combatants challenging the jurisdiction of a military tribunal could not invoke the 1929 version of the Geneva Convention because the Convention was not judicially enforceable. 339 U.S. at 789. Like the current version of the Convention, the 1929 version contained various provisions that protected individual rights. See, *e.g.*, Convention Relative to the Treatment of Prisoners of War, July 27, 1929, arts. 2, 3, 16, 42, 47 Stat. 2021, 2031, 2036, 2045, 118 L.N.T.S. 343, 357, 363, 373 (1929 Convention). The Court explained, however, that the Conven-

tion's protections, like those of most treaties, "are vindicated under it only through protests and intervention of protecting powers." *Eisentrager*, 339 U.S. at 789 n.14. Although petitioner seeks (Br. 43) to characterize this analysis as dictum, it was an alternative holding that formed the basis for the Court's rejection of the respondents' claims that the military commission violated their rights under the Convention.[8]

To be sure, the current version of the Geneva Convention does differ in some respects from the 1929 version. But, as the court of appeals concluded, none of the differences is material. Pet. App. 9a-10a. To the contrary, the plain terms of the current version of the Convention confirm that, as with the 1929 version, vindication of the treaty is a matter for State-to-State diplomatic relations, not for the domestic courts. When the President signed and the Senate ratified the current version of the Convention, there was no indication that they viewed that version as effecting a change in the essential character of the treaty by permitting captured enemy forces to challenge alleged treaty violations in the courts.

Article 1 of the 1949 version of the Convention clarified that it was the duty of every party to the Convention not only to adhere to the Convention itself, but also to ensure compliance by every other party. Compare 1949 Convention art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 ("[The parties] undertake to respect and to ensure respect for the present Convention in all circumstances."), with 1929 Convention art. 82, 47 Stat. 2059, 118 L.N.T.S. at 391 ("[The] Convention shall be re-

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[8] Petitioner suggests that the alternative holding of *Eisentrager* was undone by *Rasul* v. *Bush*, 542 U.S. 466 (2004). In *Rasul*, however, the Court considered only the "narrow" question of whether statutory habeas jurisdiction existed, *id.* at 470; it did not address the enforceability of the Geneva Convention or any aspect of *Eisentrager's* alternative holding on the merits. As the court of appeals concluded, therefore, "[t]his aspect of *Eisentrager* is still good law and demands our adherence." Pet. App. 8a.

spected * * * in all circumstances."). It does not follow from the fact that the Convention established a duty for *peer nations* to ensure enforcement through political and diplomatic channels, however, that the Convention created a right to enforcement by *individuals* through the domestic courts.

Article 8 of the 1949 version provides that the Convention is to be "applied with the cooperation and under the scrutiny of the Protecting Powers." 6 U.S.T. at 3324, 75 U.N.T.S. at 142.[9] Reliance on "protecting powers" was also a feature of the 1929 version. See 1929 Convention art. 86, 47 Stat. 2060, 118 L.N.T.S. at 393. Article 11 of the 1949 version, however, clarified and increased the role of the protecting powers in resolving disagreements. See 1949 Convention art. 11, 6 U.S.T. at 3326, 75 U.N.T.S. at 144 ("[I]n cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement."). Article 11 thus created a primary method for resolving disputes relating to application and interpretation of the Convention. See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l L. Stud. 1, 87 (1978).

Article 132 of the 1949 version created another method for resolving disputes. It states that, "[at] the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." 6 U.S.T. at 3420, 75 U.N.T.S. at 238. Article 132 further states that if "agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed." *Ibid.*

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[9] In recent times, the role of the "protecting power" has been performed by the International Committee of the Red Cross. In 1949, it was typically performed by a neutral State.

The 1929 version, by contrast, did not provide for the use of an "umpire" to settle disputes. See 1929 Convention art. 87, 47 Stat. 2061, 118 L.N.T.S. at 393. The 1949 version of the Convention thus creates specific additional mechanisms for ensuring enforcement—none of which remotely resembles a legal action brought by a detainee in the courts of the detaining nation.[10] Those enforcement provisions therefore only reinforce the Court's holding in *Eisentrager*.

As this Court noted in *Eisentrager*, a contrary construction of the Geneva Convention would severely encumber the President's authority as Commander in Chief. See 339 U.S. at 779. Indeed, petitioner's argument suggests that the hundreds of thousands of POWs held by the United States in this country during World War II were entitled to enforce the 1929 version of the Convention through private legal actions in our courts. The Executive Branch's construction of the Convention avoids such absurd consequences and is entitled to "great weight." See, *e.g.*, *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

ii. Petitioner contends (Br. 37) that, even if the Geneva Convention does not *itself* create judicially enforceable rights, it is has been made enforceable by a variety of provisions of domestic law. That argument lacks merit.

Petitioner asserts (Br. 37 n.28) that the Convention has been made enforceable by a "policy" statement made by Congress in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA), Pub. L. No. 108-375, 118 Stat. 1811. Such "sense of Congress" statements, how-

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[10] Notably, the negotiators of the 1949 version of the Convention considered, but ultimately rejected, a proposal to confer jurisdiction on the International Court of Justice to interpret or apply the Convention. International Committee of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 126-127 (1960) (ICRC Commentary).

ever, create no enforceable federal rights. See, *e.g.*, *Yang* v. *California Dep't of Soc. Servs.*, 183 F.3d 953, 958-961 (9th Cir. 1999); *Monahan* v. *Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-995 (1st Cir. 1992). Moreover, the policy statement at issue simply reaffirms the acknowledged obligations *of the United States* under the Geneva Convention; it says nothing about the availability of a cause of action for individuals in the domestic courts in the event there is a violation of those obligations. See NDAA § 1091(b)(4), 118 Stat. 2069.

Petitioner next relies (Br. 38 n.29) on Army regulations concerning the implementation of the Geneva Convention by Army personnel. By their own terms, however, those regulations do not extend any substantive rights; instead, they merely establish internal policies. See, *e.g.*, U.S. Dep't of the Army et al., Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* para. 1-1(a) (Nov. 1, 1997) (Army Regulation 190-8). And, of course, it would be quite remarkable to construe an Army regulation to create rights for enemy combatants that can be enforced in *civilian* courts. In any event, the CSRT determined that petitioner is a combatant, thus resolving the only "POW" claim petitioner raised below. As the court of appeals noted, moreover, petitioner may advance his POW claim at trial before the military commission. Pet. App. 16a.

Petitioner asserts (Br. 38-40) that his Geneva Convention claim is enforceable through 10 U.S.C. 821, which recognizes the jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." That provision, however, was originally included in the Articles of War in 1916; it therefore could not "implement" or "execute" a treaty that was ratified only in 1956. Moreover, as we have explained, that provision by its terms provides authority, rather than restricting it. It was not intended to limit the President's authority to use mili-

tary commissions in any manner, but rather to *preserve* his longstanding authority to place before military commissions persons who, like petitioner, are charged with offenses against the law of war. In any event, a statutory reference to the "law of war," without more, especially in an authorizing provision, cannot render judicially enforceable a treaty that does not by its terms create judicially enforceable rights. Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 714 (2004) (holding that statute referring to the "law of nations" was jurisdictional and did not create cause of action).[11]

Finally, petitioner argues (Br. 40) that the habeas corpus statute, 28 U.S.C. 2241, renders the Geneva Convention enforceable. As the court of appeals recognized, however, that argument is squarely foreclosed by *Eisentrager*, which rejected a habeas action brought by prisoners seeking to enforce the Convention. Pet. App. 10a. Like the federal-question statute, 28 U.S.C. 1331, the habeas statute merely confers jurisdiction and does not create any substantive rights. See, *e.g.*, *Bowrin* v. *INS*, 194 F.3d 483, 489 (4th Cir. 1999); *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 557 n.6 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963). Although the habeas statute refers to "treaties," that reference does not render all treaties judicially enforceable any more than the federal-question statute's reference to "treaties" does.[12] Unsurprisingly, every

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[11] Petitioner's reliance (Br. 39) on the canon of construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), is also misplaced. Petitioner's military commission has been established in accordance with the law of nations. In any event, this Court has never applied the *Charming Betsy* canon to invalidate a presidential action that was taken in express reliance on a federal statute and involves the exercise of the President's core authority as Commander in Chief.

[12] *Wildenhus's Case*, 120 U.S. 1 (1887), is not to the contrary. In that case, the Court affirmed the denial of a writ of habeas corpus involving a claim based on a consular treaty between the United States and Belgium. The Court did

court of appeals to have considered the question has rejected the argument that the habeas statute allows for enforcement of treaties that do not themselves create judicially enforceable rights. See *Poindexter* v. *Nash*, 333 F.3d 372 (2d Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *Wesson* v. *United States Penitentiary Beaumont*, 305 F.3d 343 (5th Cir. 2002), cert. denied, 537 U.S. 1241 (2003); *Hain* v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059 (8th Cir.), cert. denied, 537 U.S. 869 (2002). Petitioner has provided no basis for this Court to depart from that settled understanding.[13]

b. Petitioner has no valid claim under the Convention in any event

i. Even if the Geneva Convention were judicially enforceable, it is inapplicable to the ongoing conflict with al

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not purport to hold that treaty rights are privately enforceable in habeas, and *Wildenhus's Case* sheds no light on the question whether the Geneva Convention, a treaty that implicates the President's core Commander-in-Chief powers, may be privately enforced in habeas. The other cases on which petitioner relies are similarly unavailing. In *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207 (2003), the Third Circuit expressly declined to consider an argument similar to that advanced by petitioner. See *id.* at 218 n.22. In *Wang* v. *Ashcroft*, 320 F.3d 130 (2003), the Second Circuit allowed a habeas petitioner to enforce rights created not by a treaty, but by statute. See *id.* at 140-141.

[13] Moreover, in enacting the DTA, Congress has removed any basis for arguing that the habeas statute provides a mechanism for enforcing the Geneva Convention. Congress has replaced habeas jurisdiction with an exclusive review mechanism that, in contrast to the habeas statute it displaced, omits treaty-based challenges. See DTA § 1005(e)(2)(C)(ii) and (3)(D)(ii), 119 Stat. 2742, 2743. That action would preclude claims even under treaties that, unlike the Geneva Convention, give rise to judicially enforceable individual rights, and is clearly inconsistent with any notion that Congress acted to make the Geneva Convention applicable to al Qaeda, let alone in any judicially enforceable manner. Likewise, the system of judicial review that Congress established presupposes that CSRTs will obviate any treaty-based claim to an essentially duplicative Article 5 tribunal. See DTA § 1005(e)(2), 119 Stat. 2742.

Qaeda and thus does not assist petitioner. The President has determined that the Geneva Convention does not "apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to [the Convention]." J.A. 35. The President further determined that, "because [the Convention] does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war." J.A. 36. The President's determination represents a classic exercise of his war powers and his authority over foreign affairs more generally, see *Curtiss-Wright*, 299 U.S. at 320; was made in accordance with Congress's resolution authorizing the use of force; and is binding on the courts, see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

The decision whether the Geneva Convention applies to a terrorist network like al Qaeda is akin to the decision whether a foreign government has sufficient control over an area to merit recognition or whether a foreign state has ratified a treaty. In each case, the decision is solely for the Executive. See *Doe* v. *Braden*, 57 U.S. (16 How.) 635, 657 (1853) (noting that "it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered").

Even if some judicial review of the President's determination were appropriate, moreover, the standard of review would surely be extraordinarily deferential to the President. And, under any standard, the President's determination is manifestly correct. Article 2 provides that the Convention is

applicable to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" or of armed conflict between a High Contracting Party and a "Power[] in conflict" that is not a High Contracting Party insofar as it "accepts and applies the provisions" of the Convention. 6 U.S.T. at 3318, 75 U.N.T.S. at 136. Al Qaeda indisputably is *not* a "High Contracting Party" that has ratified the Geneva Convention. Nor can al Qaeda qualify as a "Power[] in conflict" that could benefit from the Convention. The term "Power" refers to States that would be capable of ratifying treaties such as the Convention—something that a terrorist organization like al Qaeda cannot do.[14] And even if al Qaeda could be thought of as a "Power" within the meaning of the Convention, it has not "accept[ed] and applie[d] the provisions" of the Convention, but has instead openly flouted them by acting in flagrant defiance of the law of armed conflict. As a result, al Qaeda and its members are not entitled to the Convention's protections. A contrary interpretation would discourage States from joining and honoring the Convention.[15]

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[14] See, *e.g.*, G.I.A.D. Draper, *The Red Cross Conventions* 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 108 (explaining that Article 2, para. 3, would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof").

[15] The conclusion that the Convention does not apply to conflicts with a terrorist network like al Qaeda is underscored by the fact that the United States has refused to ratify protocols that would extend the Geneva Convention to other types of conflicts and combatants. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

Petitioner observes (Br. 45) that he was captured in Afghanistan and that Afghanistan, unlike al Qaeda, is a party to the Geneva Convention. But the Convention does not apply based on where a particular conflict occurs, or a particular combatant is captured. Instead, Article 2 specifies that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties*." 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added). Because the United States and Afghanistan are both "High Contracting Parties," the President determined that the Convention could potentially apply to Afghanistan's Taliban regime. See J.A. 35. It does not follow, however, that the Convention would cover al Qaeda combatants who happen to be located in Afghanistan, because the conflict between the United States and al Qaeda is discrete and different from the conflict between the United States and the Taliban (and because al Qaeda is not a "High Contracting Party" or "Power" for purposes of Article 2). For the reasons discussed above, the question whether there is one conflict or two is precisely the kind of foreign-policy judgment that is committed to the President's discretion.

ii. Even if this Court were to conclude (notwithstanding the President's determination) that the Convention is applicable to al Qaeda, petitioner's trial by military commission would not violate the substantive terms of the Convention. Petitioner relies (Br. 37) on Article 102 of the Convention, which provides that "[a] prisoner of war can be validly sen-

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(Protocol II), June 8, 1977, 1125 U.N.T.S. 609. In transmitting those protocols to Congress, President Reagan expressed concern, *inter alia*, that one of the protocols would "grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war" and would thereby "endanger civilians among whom terrorists and other irregulars attempt to conceal themselves." S. Treaty Doc. No. 2, 100th Cong., 1st Sess. iv (1987).

tenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

Article 102, however, applies only to a "prisoner of war." And petitioner does not qualify as a POW for purposes of Article 102 because he does not meet the requirements set out in Article 4 for POW status. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps are eligible for POW status only if the *group* in question displays "a fixed distinctive sign," "carr[ies] arms openly," and "conduct[s] [its] operations in accordance with the laws and customs of war." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. "[T]he widely accepted view" is that, "if the group does not meet the first three criteria * * * [an] individual member cannot qualify for privileged status as a POW." W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 62 (1977); see, *e.g.*, *United States* v. *Lindh*, 212 F. Supp. 2d 541, 552 n.16, 558 n.39 (E.D. Va. 2002) (noting that "[w]hat matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so," and that "there is no plausible claim of lawful combatant immunity in connection with al Qaeda membership").[16] Al Qaeda does not remotely satisfy those criteria.[17]

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[16] In previous conflicts, the United States has made group status determinations concerning captured enemy combatants. See, *e.g.*, Levie, *supra*, at 61 (World War II).

[17] Petitioner suggests for the first time (Br. 45 n.35) that, even if he does not constitute a POW under Article 4(A)(2) because al Qaeda does not satisfy the specified criteria, he is a POW under Article 4(A)(1) because he is a "[m]ember of the armed forces of a Party to the conflict" or a "member of [the] militia[] [or volunteer corps forming part of such armed forces," or a POW under Article 4(A)(4) because he is a "person who accompan[ies] the armed forces without

Petitioner contends (Br. 36-37, 45 n.35) that his assertion of POW status is itself sufficient to establish "doubt" as to whether he is a POW, and that he must be treated as a POW until a tribunal constituted under Article 5 of the Convention eliminates that doubt. In relevant part, Article 5 provides that, "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." 6 U.S.T. at 3324, 75 U.N.T.S. at 142. In this case, however, the CSRT process, which clearly discharges any obligation under Article 5, has removed any conceivable doubt by confirming prior military determinations and finding that petitioner is an enemy combatant who is a member or affiliate of al Qaeda. Pet. App. 2a, 31a.[18]

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actually being [a] member[]." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Those claims have been forfeited because they were not raised in the court of appeals. Moreover, the Article 4(A)(1) claim assumes facts that contradict the factual assertions he has previously made, see J.A. 46, and the Article 4(A)(4) claim is refuted by the CSRT finding that petitioner is an enemy combatant. Petitioner's claims fail for the additional reason that the concept of "armed forces" in Article 4(A)(1) and (A)(4) appears to presuppose that the criteria set out in Article 4(A)(2) are satisfied. See ICRC Commentary 62-63.

[18] The CSRT was patterned after the "competent tribunal" described in Geneva Convention Article 5 and Army Regulation 190-8 (cited favorably in *Hamdi*, 542 U.S. at 538 (plurality opinion)), but provides more process. See 151 Cong. Rec. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (observing that the CSRT system "is Geneva Convention article 5 tribunals on steroids"). In proceedings before the CSRT, petitioner was entitled to call reasonably available witnesses, to question other witnesses, to testify or otherwise address the tribunal, and not to testify if he so chose. Petitioner was additionally entitled to a decision, by the preponderance of the evidence, by commissioned officers sworn to execute their duties impartially, and to review by the Staff Judge Advocate for legal sufficiency. See Memorandum from

E. Petitioner Does Not Enjoy The Protections Of Our Constitution

Petitioner's argument that the President lacks the authority to convene a military commission to try and punish him for his alleged war crimes fails for the many independent reasons discussed above. Because that argument is predicated on the proposition (Br. 10-13) that the Constitution places structural limits on the President's authority to convene military commissions, however, it fails for an additional, even more fundamental reason. As an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of our Constitution. See Reply Br. in Support of Mot. to Dismiss for Lack of Jurisdiction 18-20.

III. PETITIONER'S PROCEDURAL OBJECTIONS TO HIS MILITARY COMMISSION ARE UNFOUNDED

A. The Procedures Established For Petitioner's Military Commission Do Not Contravene The UCMJ

Petitioner argues (Br. 19-23) that the UCMJ requires that any military commission proceeding must conform to the rules for courts-martial.[19] He relies on Article 36(a) of the UCMJ, 10 U.S.C. 836(a), which authorizes the President to promulgate regulations establishing procedures for military

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Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 29, 2004) <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. In addition, unlike an Article 5 or Army Regulation 190-8 tribunal, the CSRT guaranteed petitioner the rights to have a personal representative for assistance in preparing his case, to receive an unclassified summary of the evidence before the hearing, and to introduce relevant documentary evidence.

[19] As a preliminary matter, it is not appropriate to consider objections to the procedures governing the military commissions before the commission has even applied them to petitioner. The DTA expressly authorizes detainees to raise such challenges following a final adverse decision. See § 1005(e)(3), 119 Stat. 2743.

commissions and states that such regulations "shall, so far as [the President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but * * * may not be contrary to or inconsistent with this chapter." In petitioner's view, Article 36(a) necessarily implies that the rules the President chooses to promulgate for military commissions must be consistent with the rules set out in other provisions of the UCMJ for courts-martial. That is manifestly incorrect.

Petitioner's theory rests on a fundamental misunderstanding of the UCMJ. The UCMJ is directed almost exclusively to establishing the rules for courts-martial. The UCMJ does not purport to establish comprehensive procedures for military commissions, which are preserved by the UCMJ as "our common-law war courts" with a distinct tradition that dates from the earliest days of the Republic. The UCMJ takes pains to distinguish between "military commissions" or "military tribunals," on the one hand, and "courts-martial," on the other, using these distinct terms to connote discrete, rather than equivalent, types of tribunals. In fact, only nine of the statute's 158 articles even mention military commissions and specify particular safeguards that must be provided in military commissions as well as in the more comprehensively regulated courts-martial. See 10 U.S.C. 821, 828, 836, 847-850, 904, 906. If military commissions must replicate all of the procedures employed in courts-martial, it is not at all clear why Congress bothered to preserve them.

Madsen confirms that the UCMJ provisions governing courts-martial do not extend to military commissions. In *Madsen*, the Court upheld the trial by military commission of a person who was also subject to court-martial jurisdiction under the Articles of War. In doing so, the Court made clear that the Articles of War did not apply to a trial by military

commission. The Court described military commissions as "our common-law war courts" and observed that "[n]either their procedure nor their jurisdiction has been prescribed by statute." 343 U.S. at 346-347. Rather, the Court noted, the military commission "has been adapted in each instance to the need that called it forth." *Id.* at 347-348. The Court further explained that, in contrast to its active regulation of "the jurisdiction and procedure of United States courts-martial," Congress had shown "evident restraint" with respect to the regulation of military commissions. *Id.* at 349. The Court concluded that, "[i]n the absence of attempts by Congress to limit the President's power," the President "may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Id.* at 348; see *Quirin*, 317 U.S. at 30 (noting that Congress rejected option of "crystallizing in permanent form and in minute detail every offense" triable by commissions and instead "adopt[ed] the system of common law applied by the military tribunals").[20]

Petitioner suggests (Br. 19-20 n.10) that regulations and historical practice "confirm that commissions follow court-martial rules." He quotes a portion of the preamble to the Manual for Courts Martial, which states that "military commissions * * * shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial." See Manual for Courts-Martial, pt. 1, para. 2(b)(2), at I.1 (2005). That captures roughly half the common sense of the matter. Of course, military commissions, which tend to be an episodic response to particular conflicts, borrow from the permanent procedures for courts-martial where ap-

[20] Although *Madsen* interpreted the Articles of War (notwithstanding the fact that UCMJ had already been enacted, see 343 U.S. at 345 n.6), the relevant provisions of the UCMJ are identical in all material respects to their counterparts in the Articles of War. Compare Articles of War arts. 15 and 38, 39 Stat. 653, 656, with UCMJ arts. 21 and 36, 10 U.S.C. 821, 836.

propriate. But as the omitted introductory clause of the sentence petitioner quotes makes clear, the President may tailor those procedures to the current exigency, and so the procedures are "[s]ubject to * * * any regulations prescribed by the President or by other competent authority." *Ibid.*[21]

More generally, petitioner's assertion that military commissions historically have been *required* to follow rules for courts-martial is incorrect. It is settled that military commissions "will not be rendered illegal by the omission of details required upon trials by court-martial" (and that the rules for commissions may by regulation depart from those of courts-martial). Winthrop, *supra*, at 841. Thus, while military tribunals "should observe, as nearly as may be consistently with their purpose," the rules of procedure of courts-martial, conformance to those rules "is not obligatory," and military commissions were "not bound by the Articles of War." William E. Birkhimer, *Military Government and Martial Law* 533-535

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[21] Petitioner asserts (Br. 22-23) that, during World War II, the United States took the position that "conducting a commission without the participation of the accused was a punishable violation of the laws of war." Petitioner may personally be present at every stage of the trial before his military commission, however, except if he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information. 32 C.F.R. 9.5(k); Military Commission Order No. 1, § 6(B)(3) and (D)(5)(b). Those exceptions, moreover, are surely permissible. See Charter of the International Tribunal, Aug. 8, 1945, art. 12, 59 Stat. 1548, 82 U.N.T.S. 290 (authorizing trial of defendant in his absence "in the interests of justice"). International tribunals, like domestic courts, permit trial proceedings in the defendant's absence if he engages in disruptive conduct. See, *e.g.*, International Criminal Tribunal for Former Yugoslavia R.P. & Evid. 80. Equally compelling reasons support the rule permitting the exclusion of the defendant when the prosecution is introducing classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive the defendant of a full and fair trial. See Pet. Br. App. 64a. And there is certainly no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law.

(3d ed. 1914); see Richard S. Hartigan, *Lieber's Code and the Law of War* 47-48 (1983). The *Quirin* precedent illustrates these points. See Louis Fisher, Congressional Research Service, *Military Tribunals: The Quirin Precedent* 8 (Mar. 26, 2002) <http://www.fas.org/irp/crs/RL31340.pdf> (*Quirin* commission "adopted a three-and-a-half page" statement of rules with language providing that "[t]he commission could * * * discard procedures from the Articles of War or the *Manual for Courts-Martial* whenever it wanted to.").

Congress enacted the UCMJ against the backdrop of this historical practice and understanding regarding the common-law role of the military commission. See *Uniform Code of Military Justice: Hearings Before the Subcomm. No. 1 of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1017 (1949) (statement of Robert Smart, Professional Staff Member of Subcommittee) ("We are not prescribing rules of procedure for military commissions here. This only pertains to courts martial."). The UCMJ predominantly addresses only courts-martial, with an eye toward providing a particular form of process to members of the United States armed forces. It would defeat the plain language, structure, and history of the UCMJ to read into the numerous provisions that on their face regulate only courts-martial an intent to regulate, much less all but eliminate, military commissions.[22]

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[22] Petitioner further contends (Br. 21 n.12) that the military commission's rule permitting the admission of evidence if it has "probative value to a reasonable person" conflicts with Article 36(a) of the UCMJ, 10 U.S.C. 836(a), because that article embraces the Federal Rules of Evidence. But Article 36(a) expressly authorizes the President to depart from those rules if "he considers" their application not "practicable." Pursuant to that authority, the President has made a finding that "it is not practicable to apply in military commissions" the Federal Rules of Evidence because of "the danger to the safety of the United States and the nature of international terrorism." Military Order § 1(f). In addition, the military commission's evidentiary standard is the same one commonly used by international tribunals. See, *e.g.*, ICTY R.P. & Evid. 89(C).

B. Article 3 of the Geneva Convention Does Not Apply To Petitioner's Military Commission

Finally, petitioner argues (Br. 48-50) that the procedures governing his military commission do not comport with the requirements of Article 3 of the Geneva Convention.[23] As a preliminary matter, that contention fails because the Geneva Convention is not judicially enforceable. In any event, Article 3 by its plain terms does not apply to the ongoing conflict with al Qaeda. Article 3 applies only "[i]n the case of armed conflict *not of an international character* occurring in the territory of *one* of the High Contracting Parties" (emphasis added). As the President determined, because the conflict between the United States and al Qaeda has taken place and is ongoing in several countries, the conflict is "of an international character," and Article 3 is thus inapplicable. J.A. 35. Once again, the President's determination is dispositive or, at a minimum, entitled to great weight. See Pet. App. 12a-13a.

The International Committee of the Red Cross (ICRC) commentary for the Geneva Convention confirms the President's determination. The commentary explains that the article "applies to non-international conflicts only." ICRC, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 34 (1960). "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are

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[23] Article 3 is sometimes known as "Common Article 3" because it is contained in other Geneva Conventions (on which petitioner does not rely) besides the Geneva Convention Relative to the Treatment of Prisoners of War. See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

armed conflicts, * * * which are in many respects similar to an international war, but take place *within the confines of a single country*." *Id.* at 37 (emphasis added).[24]

Petitioner relies on *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), which held that Article 3 "binds parties to internal conflicts" even if they are not States. *Id.* at 243. That case, however, did not consider the applicability of Article 3 to a conflict that is *not* internal to a single State, such as that between the United States and al Qaeda. As the court of appeals explained in this case, such a conflict may reasonably be described as being "of an international character" and therefore outside the scope of Article 3. Pet. App. 12a.[25]

In any event, petitioner's military commission complies with Article 3. In relevant part, Article 3 prohibits "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Petitioner's military commission, governed by the extensive procedural protections set out in 32

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[24] Judge Williams's contrary view (Pet. App. 16-18) not only conflicts with the text of Article 3 and the ICRC Commentary, but also with the provision's drafting history. The ICRC's draft version provided that Article 3 would apply to armed conflicts "not of an international character, * * * which may occur in the territory of one *or more* of the High Contracting Parties." ICRC Commentary 31 (emphasis added). The fact that the final text excluded the phrase "or more" confirms that Article 3 does not extend beyond civil wars and domestic insurgency movements wholly internal to a single State.

[25] Petitioner also claims (Br. 49) that certain international tribunals have held that the standards set out in Article 3 apply in all conflicts as customary international law. That disregards the text of Article 3. And, in any event, such customary international law cannot override a controlling executive act, such as the President's Military Order in this case. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that customary international law applies where there is "no controlling executive or legislative act or judicial decision").

C.F.R. Part 9, and subject to judicial review under the DTA, readily meets this standard. And the longstanding statutory recognition of the military commission as a legitimate body to try violations of the law of war and the repeated use of commissions throughout this Nation's history further refute petitioner's contention that the commission is not a regularly constituted court, as well as refuting his broader contention that use of a military commission is not authorized.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 10 U.S.C. 821, Art. 21, provides:

Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

2. 10 U.S.C. 836, Art. 36, provides in pertinent part:

President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

* * * * *

3. Pub. L. No. 109-148, 119 Stat. 2680, provides in pertinent part:

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

* * * * *

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

* * * * *

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the

Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES. —The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be

limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration

and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

* * * * *

4. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, provides:

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

5. Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002), provides:

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Sec. 1. *Findings.*

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. *Definition and Policy.*

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with

respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be—

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of

proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.*

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. *Additional Authorities of the Secretary of Defense.*

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. *Relationship to Other Law and Forums.*

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or

try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. *Publication.*

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,
Washington, November 13, 2001.

6. Geneva Convention relative to the Treatment of Prisoners of War, of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides in pertinent part:

WHEREAS the Geneva Convention relative to the Treatment of Prisoners of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

PART I

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may

arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

* * * * *

ARTICLE 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

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ARTICLE 11

In cases where they deem it advisable in the interest of protected persons particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

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ARTICLE 132

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.